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Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

PHILLIP A. BISHOP,
Petitioner

v.

O. H. DELCHAMPS, JR., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment protects the academic freedom of a professor to express controversial personal and professional opinions to students at a public university.

2. Whether, assuming a public university has authority to regulate the academic speech of its faculty, it may single out a particular viewpoint — in this case, a religious or theistic viewpoint — for discriminatory prohibition.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, T. Michael Goodrich, Sandrall Hullett, Guy Hunt, James D. Lofton, Sr., John T. Oliver, Jr., Yetta G. Samford, Jr., Martha H. Simms, Wayne Teague, Cleophus Thomas, Jr., George S. Shirley, and Cordell Wynn, all in their official capacities as members of the Board of Trustees of the University of Alabama, are respondents. Aaron M. Aronov, Winton M. Blount, William Henry Mitchell, and Thomas E. Rast, who were Defendants-Appellants in the court below, are no longer members of the Board of Trustees, and therefore are not parties in this Court. See Sup. Ct. R. 35.3.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Phillip A. Bishop petitions for a writ of certiorari to review the decision of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 926 F.2d 1066. The opinion of the district court (Pet. App. A25) is reported at 732 F. Supp. 1562.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1991. A timely petition for rehearing was denied on May

16, 1991 (Pet. App. A38). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case involves the principles of academic freedom as applied to the expression of ideas from a religious perspective by a tenure track professor in a public university. The facts are undisputed.[1]

1. *Factual circumstances.* Petitioner Phillip A. Bishop is an assistant professor in the Area of Health, Physical Education, and Recreation, in the College of Education at the University of Alabama, and Director of its Human Performance Laboratory. His academic specialty is exercise physiology, the study of the effects of acute and chronic exercise on the human body. He teaches courses in exercise physiology and related fields, predominantly to graduate students pursuing doctoral degrees. See Deposition of Phillip A. Bishop (March 14, 1989) ("Bishop Dep.") at 45-47. He has published extensively in professional journals — more than any other assistant professor in his field in the University in recent years. Pet. App. A26. He is regarded as an "excellent professor" by his supervisor, Dr. Carl Westerfield, who recommended him for early tenure. *Id.*

The University of Alabama "generally endorses academic freedom for its faculty." Pet. App. A10. The University of Alabama Faculty Handbook provides that "[f]aculty members are free to present relevant material in the classroom without prior censorship, but are expected to meet the highest standards of professional integrity." Deposition of Carl Westerfield (Jan. 5, 1989) ("Westerfield Dep."), at 37, Exh. 8. The University does not prohibit faculty members from engaging in classroom speech involving their views on various subjects, whether personal or professional. Indeed, as "[n]umerous undisputed

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[1]The court of appeals expressly accepted the statement of facts by the district court. Pet. App. A2.

affidavits" in the record show, "[s]uch discussions are the norm." Pet. App. A28.[2] The district court expressly found that "[t]here is no University policy attempting to control the statements of faculty members as long as they do their job." *Id.* It also found that there is no "University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective." *Id.*

In accordance with these academic norms and understandings, petitioner "occasionally referred to his religious beliefs during instructional time." Pet. App. A26. These comments were of two sorts. First, some of the comments "concerned his understanding of the creative force behind human physiology." *Id.* Professor Bishop adheres to the view that purely random and mechanistic evolution cannot account for the complexities of modern life forms, which are more consistent with the theory of intelligent design. As he puts it, "the best scientific evaluation of complex physiological systems and the remarkably facile and efficient function of these systems, statistically, is implausibly the result of chance and hence, must be the result of a 'creative' force." Plaintiff's Answers to Defendants' First Interrogatories to Plaintiff, No. 16, at 11; see also Bishop Dep. at 21-31 (describing his position).[3] Bishop is not a Biblical literalist (*id.* at 27-28), does not teach in support of

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[2]See Affidavits of Professors Arnold E. Carden, Joseph McRae Mellichamp, Doru Stefanescu, and Dorian Yeager. Each of these professors, in different departments of the University of Alabama, testified that university administrators have "never" prohibited professors from discussing matters of "personal interest" during instructional time, that they make such personal comments during class time, and that this serves the important pedagogical goal of improving rapport with the students. See also Deposition of Carl Westerfield Dep. at 31-33 (professors are permitted to discuss a "wide range" of topics in class, including football, current movies, politics, fishing, and jogging).

[3]Although it is a minority position, opposition to a strictly materialist understanding of evolution is not uncommon among scientific researchers and teachers. See, *e.g.*, the papers collected in Ho & Saunders, eds., *Beyond Neo-Darwinism* (Academic Press 1984); E.J. Ambrose, *The Nature and Origin of the Biological World* (Ellis Horwood 1982); Augros & Stanciu, *The New Biology*

the six-day creation story of *Genesis* (*id.* at 29), and does not oppose the theory of evolution, except insofar as it presupposes that the sole mechanism of evolutionary change is chance, through random mutations (*id.* at 30-31). Some of his comments in class relate to these ideas. These comments were "spontaneous" and occurred no more than "one or two times per month." Affidavit of Phillip A. Bishop (July 11, 1989) at 4 ("Bishop Aff.").

Second, "[i]n response to students' questions concerning academic research, publishing, tenure, or promotion," petitioner "has suggested to the students that his religious beliefs are more important than academic production, and this perspective allows him to better cope with academic stresses." Pet. App. A26. Petitioner prefaced these remarks with the statement that "this is simply my personal belief. . . . You need to recognize as my students that this is my bias and it colors everything I say and do. If that is not your bias, that is fine." *Id.* at A3. These remarks occurred "on a very infrequent basis." Bishop Aff. at 2.

It is undisputed that petitioner "never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time." Pet. App. A26. Petitioner has never been told that any of his comments disrupted instructional time or prevented him from accomplishing his teaching responsibilities. Bishop Aff. at 5. Nor has it been contended that petitioner's religious comments consumed more than the typical amount of classroom time occupied by a professor's personal remarks. Indeed, petitioner's religious references never exceeded five minutes out of 2,250 minutes of instructional time in a semester. *Id.* at 2.

(New Science Library 1987); B.C. Goodwin, "Structuralism in Biology," in 74 *Science Progress* 227 (1990). Controversy over the adequacy of orthodox evolutionary interpretations is still very much alive. See P. E. Johnson, *Darwin on Trial* (1991); Profile of "Lynn Margulis: Science's Unruly Earth Mother," in 252 *Science* 378 (April 19, 1991).

In addition to his classroom comments, petitioner conducted an optional after-class meeting for his graduate students and other interested persons in March or April, 1987, in an otherwise unoccupied classroom, on the subject "Evidences of God in Human Physiology." Pet. App. A26. During this lecture, petitioner provided a fuller statement of his professional opinion regarding intelligent design. Petitioner announced this class to his graduate students,[4] informing them that attendance was purely optional and that neither attendance nor knowledge of the material covered would affect their grade. Bishop Aff. at 5. Petitioner uses a blind grading system. Pet. App. A27. Five or six persons attended the lecture, including three of petitioner's then-current graduate students. Bishop Dep. at 39-40.

According to Dr. Carl Westerfield, petitioner's supervisor, some of petitioner's students came to him in the spring of 1987 to complain about petitioner's classroom comments and the optional lecture. Pet. App. A27; see Westerfield Dep. at 16-21. The students stated that they "did not appreciate [Professor Bishop's] interjection of Christian concepts or those type[s] of reference in class" (*id.* at 17), and that the optional lecture was "inappropriate" in that "a Christian perspective of that academic subject would be presented." *Id.* at 19.[5]

The following September, Westerfield composed and sent a memo to petitioner instructing him to refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a

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[4]He extended the invitation only to his graduate students because the lecture covered "fairly technical material" that an uninformed audience would not be able to understand. Bishop Dep. at 39. However, the meeting was open and anyone was free to attend.

[5]The only evidence of the content of these complaints is Westerfield's recollection of them. According to his recollection, the students did not suggest that they perceived any coercion to attend the optional lecture, but only that the content was "inappropriate." Westerfield Dep. at 19. Westerfield was specifically asked whether the students had made any other complaints about the optional lecture, and answered, "No." *Id.* at 20.

'Christian Perspective' of an academic topic is delivered." Pet. App. A27; see Bishop Dep., Exh. 4. Petitioner is subject to academic discipline, ranging from a letter of reprimand to dismissal from his faculty position, if he violates the order. See Deposition of Rodney Roth (Jan. 5, 1989) ("Roth Dep.") at 44. No other professor at the University is subject to analogous restriction on either the expression of personal opinion in class or the perspective or ideological orientation from which he teaches.

Westerfield acknowledged that at the time he issued this directive to petitioner he did not know "precisely what [petitioner] said in the classroom" (Westerfield Dep. at 29), but stated that the expression of religious views on an academic topic is not "appropriate for a public institution." *Id.* at 15. He explained that petitioner's reported comments "hurt[] the reputation" of the University of Alabama because "other professional colleagues around the nation consider this the 'Bible belt' and [think] that there is a lot of this type of activity goes on in the University." *Id.* at 42-43. "I felt like we need to send a message to Dr. Bishop that these things are inappropriate." *Id.* at 43.

Petitioner protested the restriction of his academic speech to the University administration. The Dean of the School of Education, Rodney Roth, consulted the University's legal counsel, who advised that the University was under a "duty" to "control this kind of activity" to avoid violation of the Establishment Clause. Westerfield Dep., Exh. 10; see Pet. App. A27-A28. Dean Roth then reaffirmed the Westerfield memo. He stated that his objection to petitioner's academic speech was predicated solely on "legal reason[s]." Roth Dep. at 36; see also *id.* at 20 (when the matter was brought to his attention, Dean Roth treated it as a "legal issue").[6] In May of 1988,

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[6]At one point in his deposition, Dean Roth stated that "I think instructional time is important and it should be instruction based on the syllabus of the course" (Roth Dep. at 35), but on closer questioning he admitted that he "had no idea how much instructional time was being used" and that his objection was to the content of petitioner's classroom comments and not to the time they might have taken. *Id.* at 22.

Bishop petitioned the President of the University for rescission of the order, but it was reaffirmed. Pet. App. A28.

Petitioner has at all times complied with the University's order, which remains in effect. Pet. App. A27. Petitioner testified that the order has constrained his ability to speak and teach freely in the classroom. Bishop Dep. at 42-43.

2. *Procedural history.* Petitioner brought suit in the United States District Court for the Northern District of Alabama against respondents, the Trustees of the University of Alabama, contending, among other things, that the limitation on his classroom and extracurricular speech violated the Free Speech Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. In answer, respondents contended that the University had a duty to impose this limitation under the Establishment Clause of the First Amendment. Pet. App. A28-A29.

On cross motions for summary judgment, the district court entered an order enjoining respondents from restricting petitioner's classroom speech or prohibiting petitioner from conducting optional after-class lectures, provided he assures his class that he will use a blind grading system. Pet. App. A36-A37. The district court held that "[f]aculty members are at liberty to divulge personal views in the classroom as long as they are not disruptive of classroom activities." *Id.* at A31. It found, as a factual matter, that petitioner's "expression of his personal views has not been disruptive and has not interfered with his teaching which is viewed as commendable." *Id.* at A32.

Noting that "[t]he University's only justification" for exclusion of petitioner's religious views from the classroom "is an effort to avoid an establishment of religion," the court held that "[t]his is not sufficiently compelling to support a content-based discrimination against plaintiff's extracurricular on-campus discussions with students or his in-class statements." Pet. App. A32. It held that petitioner's comments "constitute a discussion of means and origins, a legitimate educational topic," and thus had a secular purpose (*id.* at A33), and that the after-

class meeting was "part of an open exchange of ideas between students and faculty," which is "consistent with the University's educational purpose and consistent with the practices of other professors who participate in such meetings" (*id.* at A32). The court held that petitioner's comments "do not primarily advance religion" because "[t]here is no evidence that anyone believes his comments are anything other than his personal 'bias' or that his religious views are in the least way sponsored by the state." *Id.* at A34. It observed that "[t]he court doubts that the plaintiff's minimal comments exert influence on the religious beliefs of college or graduate students." *Id.* at A35. The court also rejected respondents' argument that petitioner's activities would lead to excessive government entanglement with religion, noting, to the contrary, that to monitor petitioner's speech for religious references would "be an especially offensive violation" of the First Amendment. *Id.* at A36.[7]

The Court of Appeals for the Eleventh Circuit reversed. While adopting the district court's statement of facts (Pet. App. A2), the court held that the order restricting petitioner's speech was within the "University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time." *Id.* at A16; see also *id.* at A24. The court held that academic freedom is not "an independent First Amendment right" (*id.* at A18). In so holding, the court relied on this Court's cases involving the speech of high school students participating in school-sponsored activities. *Id.* at A15-A16, citing *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988). The court argued that "a teacher's speech can be taken as directly and deliberately representative of the school" (Pet. App. A13). Under this reasoning, "[t]he University necessarily has dominion over what is taught by its professors." *Id.* at A24. The University may prohibit a professor from teaching

[7]The district court also held that the restriction on petitioner's speech was vague, in that it "fails to provide adequate notice of the proscribed speech," and overbroad, in that it "reaches statements not violative of the Establishment Clause." Pet. App. A32.

from a particular "viewpoint" during instructional time, "even to the extent that it represents his professional opinion about his subject matter." *Id.* at A20.

Based on the same reasoning, the court of appeals also held that "the University may restrict a professor from conducting an 'extra' or 'optional' class or meeting under the patronage of a university course." Pet. App. A23. "In particular," the court stated, "scheduling the class directly before finals and describing it as an 'optional class' can be prohibited to avoid the apparent sponsorship of the University." *Id.* The court noted, however, that "the University cannot prevent Dr. Bishop from organizing such a meeting for interested persons, either on or off University grounds." *Id.*

In response to petitioner's argument that his religious viewpoint was singled out by the University, the court of appeals acknowledged that "the University has no policy for limiting the speech of its professors only to their subject areas" and that the record contains "numerous affidavits by other instructors at the University" regarding their "extracurricular speech in the classroom." Pet. App. A10. But the court distinguished petitioner's speech on the ground that "some topics understandably produce more apprehension than comfort in students" and that no other speech by an instructor "has produced student complaints or struck constitutional chords." *Id.* The court observed that "[j]ust as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes." *Id.*

Having held that the University has broad authority to regulate the academic speech of its professors, the court did not reach respondents' contention that the restriction was required by the Establishment Clause. Pet. App. A22.[8]

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[8]The court of appeals rejected the district court's conclusion that the memo to petitioner was unconstitutionally vague, stating that "as a professional, Dr. Bishop know[s] that the University asks only that he separate his personal and professional beliefs and that he not impart the former to his

REASONS FOR GRANTING THE PETITION

One can imagine a professor of exercise physiology at the University of Alabama 30 years ago making "occasional comments" to his class that his studies of the human body confirmed the equality of black and white, and one can imagine the administrators of the University of Alabama, 30 years ago, issuing a directive ordering him to cease from interjecting his personal political opinions into his classroom teaching. One cannot imagine, however, that a federal court of appeals would uphold such a directive, stripping the academic freedom of public university professors of any significant First Amendment protection and condoning express viewpoint-based restrictions on speech on the ground that some students had complained. Yet that is precisely what the court below has done — the sole differences being that the date is 1991 and the professor's comments were about the intelligent design of the body rather than about racial equality.

Academic freedom today is under threat from a different source than it was 30 years ago, but the legal principles have not changed. Contrary to the court below, academic freedom remains "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). "The essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In this case, the threat to academic freedom arises from the embarrassment of administrators who fear that academics at other institutions might come to regard the University of Alabama as a "Bible Belt" university. Elsewhere, it comes from the impulse to impose a regime of "political correctness" on the academy. The speech so suppressed in academia may seem to some of us misguided, unscientific, parochial, or immoral. Some may think that of Professor Bishop's opinions. But whatever the ideological impetus to censor academic speech, and whatever the ideological target, the First Amend-

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students during 'instructional time' or under the guise of the courses he teaches in so-called optional classes." Pet. App. A10.

ment stands as a barrier to the imposition of academic orthodoxy and a shield for the free expression of controversial, even embarrassing, ideas.

The decision of the court of appeals is an unequivocal rejection of the proposition that the First Amendment protects academic freedom. It expressly reduces the constitutional protection for the academic speech of university professors to the level of high school students writing for a school newspaper as part of a journalism class. Pet. App. A15-A16. It subjects the University's directive regarding the professor's speech in the classroom to mere "reasonableness" review (Pet. App. A15, A16, A19, A20, A24) — "even to the extent that it represents his professional opinion about his subject matter" (*id.* at A20). It tolerates even expressly viewpoint-discriminatory regulation. *Id.* at A10, A20. It thus stands in conflict with this Court's academic freedom decisions, and with numerous cases in the lower courts. Review of this decision is needed to reaffirm the constitutional principles that protect academic freedom and to provide clear guidance to the lower courts about how to adjudicate claims of interference with academic freedom by administrators of public universities.[9]

I. The First Amendment Protects The Right Of Professors At Public Universities To Express Controversial Opinions To Their Students

A. The decision below strips academic freedom of its constitutional protection

The first question raised by this case is whether academic freedom in the university classroom is entitled to constitutional protection under the First Amendment. While profess-

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[9]The First Amendment principles invoked in this petition apply only to public institutions. Virtually all private, nonsectarian colleges and universities embrace the same principles of academic freedom, but in most cases these are legally enforceable as a matter of contract, if at all. Religious colleges and universities sometimes modify academic freedom principles in

ing itself "mindful of the invaluable role academic freedom plays in our public schools," Pet. App. A17-A18, the court of appeals observed that "we do not find support to conclude that academic freedom is an independent First Amendment right." Pet. App. A18. The court drew a distinction between the academic freedoms of publication and extramural speech, which it recognized as legally protected, and the academic freedom of the classroom, which it did not. See Pet. App. A20 (a professor's "educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts an an independent educator or researcher"). With regard to teaching, "[t]he University's conclusions about course content must be allowed to hold sway over an individual professor's judgments . . . even to the extent that it represents his professional opinion about his subject matter." *Id.*

Accordingly, the court held that restrictions imposed by a public university on the academic speech of its professors need only satisfy "reasonableness" review — the lowest level of judicial scrutiny. The court treated the University as "a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons." Pet. App. A16. The court stated that university administrators have the authority to impose "'reasonable restrictions' over in-class speech that it could not censor outside the classroom." *Id.* at A15. Most importantly, the court held that the University "has an interest . . . in scrutinizing expressions that 'the public might reasonably perceive to bear [its] imprimatur.'" *Id.* at A13 (citation omitted; brackets in original). This is the right of academic censorship, plain and simple. If the classroom speech of all of its instructors can reasonably be "taken as directly and deliberately representative of the school," as the court of appeals averred (*id.*), it must follow that every instruc-

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order to maintain their creedal commitments. References in this petition to "universities" should be understood as limited by this context.

tor can be required to confine himself to ideas that the University is willing to approve.[10]

The outcome of this case depends squarely on the choice of legal standard. The district court had held, as a matter of law, that "[f]aculty members are at liberty to divulge personal views in the classroom as long as they are not disruptive of classroom activities" and have a "constitutionally protected right" to inform their students of their "personal political and philosophical views" so long as they do not "proselytize students or . . . devote so much of class time to such matters that instruction of the subject matter is impaired." Pet. App. A31-A32 (citation omitted). It found, on the question of fact, that "Bishop's actions do not rise to that level. Expression of his personal views has not been disruptive and has not interfered with his teaching which is viewed as commendable." *Id.* at A32. The court of appeals expressly adopted the district court's factual findings, but disagreed with the district court's statement of "the controlling legal principles and the conclusions to be drawn from them" (Pet. App. A2), and on this basis reversed the decision.

It must be emphasized that the court of appeals' rejection of First Amendment protection for academic freedom in the classroom is not limited to religious speech. Indeed, the court analogized Bishop's comments to those of a "sexist instructor" and suggested that speech that produces "more apprehension than comfort in students" is subject to university regulation. Pet. App. A10. This underscores the breadth and danger of the court's position. This sweeping decision would allow a public university to bar a professor from expressing opposition to affirmative action on the ground that such teaching causes

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[10]Thus, even if respondents' actions were evaluated under a "reasonableness" standard, they should be held to violate the First Amendment, because the only pedagogical concern identified by the University or mentioned by the court of appeals was the desire to avoid placing the University's "imprimatur" on petitioner's views, which is an illegitimate concern. See *Widmar v. Vincent*, 454 U.S. 263, 280-81 (1981) (Stevens, J., concurring).

"anxiety in students" (*id.* at A22), or to forbid an economist from teaching economics from a Marxist perspective on the ground that this places the university's "imprimatur" (*id.* at A13) on Marxist ideology. This puts an end to academic freedom as a legal proposition.

B. The decision below conflicts with this Court's pronouncements regarding academic freedom

The decision below conflicts with principles of academic freedom long enunciated by this Court. The leading case is *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The Court held that

> academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

Id. at 603 (citations and internal quotations omitted). By this the Court did not mean that only those academic perspectives approved by university administrators were protected. It did not suggest that the judgments of university administrators — or anyone else — "must be allowed to hold sway over an individual professor's judgments" (Pet. App. A20). Rather, *Keyishian* embraced the tradition of academic freedom that has governed modern American research universities since their beginnings in the late 19th Century — the tradition that individual scholars must have independence to teach in the classroom without interference from the outside, except on carefully limited grounds closely related to instructional performance.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court addressed the legality of restrictions on the expression of controversial political opinions in the educational context (in that case, the wearing of black arm bands to protest the war in Vietnam). The Court held that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. This meant that administrators could not suppress the expression of opinions "even on controversial subjects," unless the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collide[] with the rights of others." *Id.* at 512-13. This did not include the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. The Court made clear that this right of expression extends to both "teachers and students." *Id.* at 506.

These general principles of academic freedom are reinforced by the doctrines of vagueness and overbreadth. *Keyishian*, 385 U.S. at 603-04. As a practical matter, it is difficult for university authorities to interfere in academic speech in ways that are sufficiently precise and narrowly tailored to pass constitutional muster. See *Doe v. University of Michigan*, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989). In this case, the district court found that the order restricting petitioner's speech was both vague and overbroad (Pet. App. A32) — a conclusion the court of appeals was able to overcome only by interposing a "narrowing construction" (Pet. App. A9) that both conflicts with the plain language of the order and is internally inconsistent. See *id.* at A20 (interpreting the ban on "optional classes" as permitting optional classes); and compare *id.* at A10 (the "University asks only that [petitioner] separate his personal and professional beliefs") with *id.* at A20 (University may censor his classroom speech "even to the extent that it represents his professional opinion about his subject matter"). Moreover, given the lack of general standards, no faculty member at the

University of Alabama can predict when his expression of personal or professional opinion may lead to similar rebuke.

Since *Keyishian* and *Tinker*, these principles have been reiterated in numerous opinions of the Court — though no case has presented so direct an infringement on academic freedom in the university classroom as this one. *E.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991) (the Court has "recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (citation omitted) (academic freedom is "the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment"); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309 (1986) (calling the dismissal of a teacher for allegedly inappropriate classroom presentation a violation of "academic freedom"); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 ("Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students"). See Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law & Contemp. Prob. 79 (1990).

The decision below conflicts with this established line of Supreme Court decisions. It holds, in conflict with *Keyishian*, that the classroom teaching of a university professor is not constitutionally protected (beyond "reasonableness" review). And it holds, in conflict with *Tinker*, that the expression of controversial opinions can be prohibited even if there is no evidence of classroom disruption or other interference with instructional effectiveness. The court sought to distinguish *Keyishian* on the ground that "*Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths" and "cannot be extrapolated to deny schools command of their own courses." Pet. App. A17. It distinguished *Tinker* on

the ground that "the case involves students, not teachers" (*id.* at A12), disregarding the language of the *Tinker* opinion, which included both "teachers and students" (393 U.S. at 506) within its ambit.

Having brushed aside *Keyishian* and *Tinker*, the court of appeals "adopt[ed] . . . as suitable to our ends" the constitutional standard applied in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Pet. App. A15-A16. In *Kuhlmeier*, the Court held that high school officials could exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Without explanation, the court of appeals extended this principle from high schools to universities, and from students to professors. Under the court's holding, the academic freedom of university professors in the classroom is reduced to the level of high school journalism students writing for the school's newspaper. That is a shocking proposition, which calls out for this Court's review.[11]

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[11] In *Kuhlmeier*, the Court expressly noted that its holding would not necessarily apply to the university level. 484 U.S. at 273-74 n.7. Among the many differences between *Kuhlmeier* and this case are: (1) in *Kuhlmeier*, the Court relied on express school policies and practices placing the content of the newspaper under the authority of the journalism teacher, subject to review by the principal (*id.* at 268-69), whereas in this case the University of Alabama Faculty Handbook and the consistent practices of the University (other than in this instance) accorded broad academic freedom to professors and protected their right to make controversial comments in class and to conduct after-class meetings; (2) the constitutional standard in *Kuhlmeier* is based on the principle that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials" (*id.* at 273), whereas higher education is based on the principle that the classroom is an extension of independent scholarly inquiry; and (3) editorial control over a student journalist's writing is an inevitable part of journalistic education (as it is of professional journalism), whereas administration control over the viewpoints expressed by a professor is antithetical to the educational process and contrary to the tradition of academic freedom in higher education.

C. The decision below conflicts with many holdings of state and lower federal courts

In addition to conflicting with *Keyishian* and *Tinker*, the decision below is inconsistent with a number of lower-court decisions that have applied the *Tinker* standard to the classroom speech of professors at the university level. On its facts, this case is remarkably similar to *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979), in which an untenured history professor was denied reappointment after he informed his class that he was a communist and that he taught his courses from a Marxist point of view. The court held the University's action unconstitutional, applying the "material and substantial interference" standard of *Tinker*. *Id.* at 810. The court concluded that the professor's "announcement of his personal, political and philosophical beliefs in his classes was constitutionally protected." *Id.*[12] The decision below also conflicts with the Fourth Cir-cuit's decision in *Kim v. Coppin State College*, 662 F.2d 1055, 1063-65 (4th Cir. 1981), which held that the First Amendment protects the academic freedom of professors to express controversial opinions to students in the absence of an "objective evaluation of the actual harm caused, not perceived or potential harms." See also *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989); *Franklin v. Atkins*, 409 F. Supp. 439, 445-46 (D. Colo. 1976), aff'd, 562 F.2d 1188 (10th Cir. 1977), cert. denied, 435 U.S. 994 (1978); *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1344, 269 Cal. Rptr. 882, 891 (4th Dist.), cert. denied, 111 S.

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[12]In *Cooper*, the University attempted to "prove that because Cooper taught from the Marxist point of view, he deviated from the prescribed subject matter." The court found, however, that "there was little or no evidence that Cooper did not substantially cover the material." 472 F. Supp. at 813. Similarly, in this case, University administrators sought to justify their action on the basis that Professor Bishop's comments were not part of his subject (Roth Dep. at 49), but acknowledged that the comments had not affected Professor Bishop's "ability to cover the course material that he has been assigned to cover" (Westerfield Dep. at 44).

Ct. 557 (1990); *Carley v. Arizona Bd. of Regents*, 153 Ariz. 461, 737 P.2d 1099 (Ariz. App. 1987).

Even at the high school level, many courts have held that the teacher's expression of ideas to students is constitutionally protected, applying the *Tinker* standard or higher. *E.g., Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Bertot v. School District No. 1*, 522 F.2d 1171, 1183 (10th Cir. 1975); *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 631-33 (2d Cir. 1972) cert. denied, 411 U.S. 932 (1973); *James v. Bd. of Education*, 461 F.2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Pred v. Bd. of Public Instruction*, 415 F.2d 851 (5th Cir. 1969), cert. denied, 397 U.S. 1015 (1970); *Dean v. Timpson Independent School Dist.*, 486 F. Supp. 302, 307-08 (E.D. Tex. 1979); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1364 (D. Ore. 1976); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657, 661-62 (S.D. Tex. 1972), rev'd on other grounds, 496 F.2d 92 (5th Cir. 1974); *Moore v. Gaston County Bd. of Ed.*, 357 F. Supp. 1037, 1040 (W.D. N.C. 1973); *Parducci v. Rutland*, 316 F. Supp. 353 (M.D. Ala. 1979); *Watson v. Eagle County School Dist.*, 797 P.2d 768, 770 (Colo. App. 1990), cert. denied, *Eagle County School District RE-50 v. Watson*, 1990 Colo. LEXIS 646 (Colo. 1990); *River Dell Education Ass'n v. River Dell Bd. of Ed.*, 122 N.J. Super. 350, 300 A.2d 361, 365 (1973).

These decisions are in conflict with the decision below. Any degree of academic freedom recognized at the high school level applies, *a fortiori*, to university professors (though the converse is not necessarily true). The position of the court below, that university professors have no greater academic freedom than teachers at the secondary level (Pet. App. A15-A16), has been emphatically rejected by most other lower courts. *E.g., Martin v. Parrish*, 805 F.2d 583, 588 (5th Cir. 1986) (Hill, J., concurring); *Adams v. Campbell County School Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975); *Burns v. Rovaldi*, 477 F. Supp. 270, 275-76 (D. Conn. 1979); *DiBona*, 269 Cal. Rptr. at 892-93, 220 Cal. App. 3d at 1345-1347. This Court has noted

that the mandatory attendance and greater impressionability of students makes it more necessary and appropriate for school officials to control the content of the speech in the high school classroom. *Edwards v. Aguillard*, 482 U.S. 578, 584 & n.5 (1987); *Kuhlmeier*, 484 U.S. at 272. See also *Board of Education v. Pico*, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting). These conditions do not exist in the university.[13]

The importance of resolving this conflict is underscored by recent analyses in the academic literature. Compare Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law & Contemp. Prob. 227 (1990) (arguing that the academic freedom of individual professors at public universities is constitutionally protected), with Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251 (1989) (arguing that, for the most part, constitutional protections for academic freedom have been and should be confined to protections for the institutional autonomy of the university rather than the autonomy of the professor *vis-a-vis* the university). The decision below exacerbates this uncertainty about constitutional protection, and thus contributes to the atmosphere of vulnerability of unpopular viewpoints in the academy. This Court's guidance is urgently needed so that professors, administrators, and lower courts will know what legal protections exist for academic speech in the nation's universities.

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[13]The court of appeals stated that *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), petition for cert. pending, No. 90-1448, is "factually similar" to this case. Pet. App. A13. But *Roberts* involves a fifth grade teacher — a context that is neither factually nor legally comparable to that of a university professor. Accordingly, the legal issues in the two cases are entirely different: *Roberts* centers on the application of the Establishment Clause to a fifth grade classroom, while this case centers on the academic freedom of university faculty under the Free Speech Clause.

D. The reasoning of the decision below is antithetical to traditional understandings of the nature and function of American universities

Application of the Free Speech Clause to particular circumstances is heavily dependent on the institutional setting. Compare, *e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (antiwar leafletting on military base held unprotected), with *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning in public demonstration held protected), or *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (sexually suggestive speech by student orator at high school assembly held unprotected), with *Papish v. Bd. of Curators of University of Missouri*, 410 U.S. 667 (1973) (sexually explicit language in underground college newspaper held protected). In each instance, the purpose is to apply the free speech principles of the First Amendment in light of the traditional expectations and competing purposes of the forum in which the speech takes place. Academic freedom is simply the application of freedom of speech in the particular context of the university classroom. See Rabban, *supra*, 53 Law & Contemp. Prob. at 246-47 (academic freedom should be viewed "not primarily as a special right unique to professors, but as a specific application of the broader principle that the institutional context of speech often has first amendment significance"). Unfortunately, the decision below rests on several fundamental misconceptions regarding the nature of American higher education, and thus misperceives the degree to which university authorities can control a professor's expression of personal or professional opinion in the classroom.

First, under American traditions of academic freedom it is not true, as the court of appeals repeatedly stated in various words, that University administrators exercise "dominion over what is taught by its professors" (Pet. App. A24). The University must establish the contours of the curriculum, and may dictate issues of curricular coverage, but it may not determine the professor's viewpoint or scholarly approach. It is essential to classroom teaching that the professor be independent — and that means he must have latitude to say things the admin-

istrators deem "inappropriate," as well as things they support. The 1915 *Declaration of Principles* of the Association of American University Professors, the foundational document upon which modern understandings of academic freedom are based, explains the principle this way:

> It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. No man can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity. It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with that candor and courage which youth always demands in those whom it is to esteem.

General Report of the Committee on Academic Freedom and Tenure, 1 AAUP Bulletin 17 (1915), reprinted at 53 Law & Contemp. Prob. 393, 398 (1990). The court of appeals' assumption that academic freedom pertains only to publications and extramural speech (Pet. App. A19, A20) is contrary to the fundamental theory of academic freedom upon which all modern American academic life depends.

Second, the authority of university administrators over professors may not be equated to that of "a public employer which may reasonably restrict the speech rights of employees." Pet. App. A16. The 1915 *Declaration of Principles* observes that university professors are "appointees, but not in any proper sense the employees" of the University authorities. This is because, "once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene." 53 Law & Contemp. Prob. at 397. See *Rust v. Sullivan*, 111 S. Ct. at 1776. University professors have not just the right, but the responsibility, to follow their own scholarly judgment in their utterances to their students. This means that some professors will

express views that seem benighted to the administration. That is the price we pay for academic freedom. Sometimes it is not a price but an inestimable benefit.

Third, the court of appeals wrongly assumed that "a teacher's speech can be taken as directly and deliberately representative of the school." Pet. App. A13. This, according to the court, gives the University an "interest . . . in scrutinizing expressions that the public might reasonably perceive to bear [its] imprimatur." *Id.* (internal quotation omitted; bracket in original). No proposition could be more dangerous to the freedom of scholarly inquiry than the proposition that the university may censor its professors' classes in order to dissociate itself from ideas that might generate public disapproval. A professor has and must have scholarly independence. If the public misunderstands this — as has happened all too often in our history — this is properly an occasion for public education about the nature of scholarly inquiry, not a justification for censorship.

Finally, the court of appeals assumed that "a professor's speech inherently possesses" a "coercive effect upon students," which the university has a legitimate interest in regulating. Pet. App. A16. To the contrary, the premise of higher education is that exposure to ideas is liberating, not coercive. The student may be exposed to the opinions of a socialist in the morning and a supply-sider in the afternoon, to a theist on Mondays and an atheist on Tuesdays. To preclude a student from hearing the professor's opinions, in the guise of "protecting" him from "coercion," is antithetical to the philosophy of higher education. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 U.S. at 603 (citation omitted; brackets in original).[14]

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[14]The court of appeals noted that "[t]he University's interest is most obvious when student complaints suggest apparent coercion— even when not intended by the professor." Pet. App. A16. Petitioner wholeheartedly agrees

The decision below thus relies on an understanding of the university wholly at odds with this Nation's long-standing traditions of scholarly inquiry and academic freedom. As powerful voices are raised in academia for increased regulation of the political correctness of university instruction (see generally D. DeSouza, *Illiberal Education* (1991)), the protections of the First Amendment are urgently needed to forestall even well-meaning university regulations that would "cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.

II. The First Amendment Bars Public Universities From Restricting Speech On The Basis Of Its Viewpoint, Where Comparable Speech Expressing Other Viewpoints Is Permitted

Even apart from the First Amendment's "special concern" for academic freedom, the decision of the court below is inconsistent with the most fundamental principle of freedom of speech: that government officials may not discriminate among speakers on the basis of their viewpoint. See Stone, *Content Regulation and the First Amendment*, 25 Will. & M. L. Rev. 189 (1983).

Except for the viewpoint, petitioner's classroom statements of his religious opinions do not differ from the statements of a feminist professor of literature who might make comments about the subordination of women as seen in the works under review, of an economically-oriented law professor about the efficiency of the common law, or of an atheistic professor of

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that the University has the right and the responsibility to protect students from academic coercion. See pages 28-29, *infra*. But the existence of complaints does *not* necessarily suggest coercion; it may merely suggest student disagreement or ideological disapproval. In this case, the students who complained did not allude to any pressure or coercion (see note 5, *supra*), and the district court expressly rejected respondents' claim that petitioner's actions were coercive. Pet. App. A27, A34. If Professor Bishop's mild statements in class were deemed "coercive," there could be no such thing as "noncoercive" speech in a university setting.

zoology about the inconsistency between the idea of divine creation and the facts of biology. Each of these comments reflects a certain ideological orientation, each is related, at least indirectly, to the subject matter, and each is within the normal range of expected behavior in a university classroom. Even if Professor Bishop's comments were wholly irrelevant to the subject matter, this would not be different — except as to viewpoint— from the professor who devotes a few minutes of class to denouncing the War in Vietnam, the President's choice of a Supreme Court nominee, or the dismal performance of the Chicago Cubs. Similarly, petitioner's comments to his graduate students that his priorities in life, derived from his Christian faith, help him to deal with academic stress, are not different — apart from the viewpoint expressed — from the advice any other professors might give students about academic life, based on their personal experiences, priorities, or values. In the university, no one philosophy or viewpoint is privileged, and none is categorically excluded.

The record in this case shows that the University of Alabama does not forbid its professors to make personal comments in class; indeed, this is the "norm." Pet. App. A6, quoting Pet. App. A28. The district court found that "[t]here is no University policy attempting to control the statements of faculty members as long as they do their job." *Id.* at A28. Petitioner is the only University of Alabama professor to be censored; and his theistic point of view is the only ideological perspective to be banned. On the face of the memo sent to petitioner, the viewpoint-based discrimination is apparent: only "religious beliefs" are covered — not anti-religious beliefs, not political beliefs, not social beliefs — and only optional lectures "where a 'Christian Perspective' of an academic topic is delivered" are subject to special rules.[15] The University has never stated any

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[15]The district court observed:

> It would be clearly violative of the first amendment to allow presentation of one side of a debatable public question an advantage while suppressing the other. The University's directive is inconsistent. While it precludes discussion of academic subjects from a

reason — other than his religious viewpoint — why petitioner has been denied rights extended to every other member of the University of Alabama faculty.

There is no more deeply-ingrained principle of free speech than that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 804 (1984); see *Rust v. Sullivan*, 111 S. Ct. at 1772; *Texas v. Johnson*, 491 U.S. 397, 413 n.9 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *Schacht v. United States*, 398 U.S. 58 (1970). "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *League of Women Voters v. FCC*, 468 U.S. 364, 383-84 (1984). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511. To single out petitioner's opinions — when professors holding other, equally controversial, opinions are free to comment about them in class or to lecture about them to willing audiences — is an unmistakable violation of this principle.

That petitioner's intellectual perspective happens to be religious does not remove his speech from the protections of the First Amendment. Content-based regulation of speech is no more legitimate when the speech is religious than when the speech is secular. See *Widmar v. Vincent*, 454 U.S. 263 (1981);

"Christian Perspective," it does not ban Jewish, Moslem, Hindu, Taoist, or other religious perspectives of course work.
Pet. App. A35.

Board of Education v. Mergens, 110 S. Ct. 2356, 2370-71 (1990); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). Cf. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (prohibiting discrimination in favor of religious periodicals).[16] We recognize that religious opinions are frequently controversial and that some listeners may be offended by them. But the same can be said of Afrocentric perspectives, Freudian perspectives, or the doctrine of original intent in constitutional law, all of which are protected under the First Amendment. Unless the circumstances of the speech are such that it might violate the Establishment Clause — and the district court held that petitioner's speech did not, a conclusion the court of appeals did not overturn[17] — there is no basis for treating petitioner's religious perspective as uniquely dangerous or intellectually inferior.

Petitioner agrees that the judiciary should not intervene in or second guess the "genuinely academic decision[s]," of uni-

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[16]Courts have frequently protected the academic freedom rights of instructors to present *anti-religious* materials or opinions to their students. *E.g.*, *Moore v. Gaston County Bd. of Education*, 357 F. Supp. 1037 (W.D. N.C. 1973); *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 254 Cal. Rptr. 714 (1989). It would be anomalous to protect academic discourse that attacks or degrades religion, but not academic discourse that supports it.

[17]The district court's conclusion regarding the Establishment Clause (Pet. App. A32-A36) is obviously correct. Just as university (and even high school) students understand "that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis" (*Mergens*, 110 S. Ct. at 2372), they understand that professors' personal opinions are their own. It would be difficult to say whether this is the result of academic freedom or a prerequisite for it; but in an institution that publicly announces a policy of academic freedom it is manifest to all that the views of the faculty cannot be attributed to the university and that the students are free to make up their own minds as part of the freedom of intellectual inquiry. Of course, the institution has a special responsibility in the context of religion to ensure that the faculty member conducts himself in such a way that the students are not coerced into professing his religious beliefs, but as discussed below, the problem of potential coercion is not unique to religious perspectives and must be resolved without discrimination on the basis of viewpoint.

versity authorities, made in "good faith" and not on the the basis of "nonacademic or constitutionally impermissible reasons." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). In this case, however, the final decision-makers viewed the dispute as a "legal issue" (Roth Dep. at 20, 36) rather than a pedagogical one. University lawyers opined that the University had a legal "duty" to suppress petitioner's speech (Westerfield Dep., Exh. 10, at 3), and the administrators followed that advice. In district court, the "only justification" respondents asserted for their limitation on petitioner's classroom speech was it was required by the Establishment Clause. Pet. App. A32. There is no reason the courts should defer to the hypertrophic interpretations of the Establishment Clause held by university administrators and attorneys. *Widmar v. Vincent*, 454 U.S. at 280-81 (Stevens, J., concurring).

The University's misplaced reliance on the Establishment Clause is an admission that its treatment of petitioner was based on the religious content of his speech rather than any neutral pedagogical justification. Beyond supposed constitutional problems, petitioner's supervisors never identified any issue of "academic" concern about his teaching — unless this would include Dr. Westerfield's notions that religious opinions are "inappropriate" and might cause "other professional colleagues around the nation" to think of the University of Alabama as a "Bible Belt" institution (Westerfield Dep. at 42-43). Needless to say, to discriminate against religious opinions on this basis is no more legitimate than to censor the teaching of a Critical Legal Studies adherent out of fear that alumni may view the school as "left-wing," or of a Zionist for fear of offending Third World sensibilities.

Petitioner freely concedes the rightful authority of University administrators, through proper academic procedures, to set the curriculum for his classes and to evaluate his professional competency. This case presents no challenge to those powers. Professor Bishop's supervisors have stated that his comments have not interfered with his coverage of the assigned material (Westerfield Dep. at 45) and that he is a excel-

lent teacher and scholar (*id.* at 51). Petitioner also agrees that the University has the rightful authority to make and enforce certain rules regarding faculty performance in the classroom. Specifically, the University has the right to demand that any personal comments made in class do not consume so much time that the coverage of the material suffers; that any comments not disrupt the class or interfere with the teaching mission; and that any expression of ideological opinion be done in a noncoercive manner. Academic freedom does not include the right to abuse the classroom for propaganda purposes.[18] But petitioner insists that such regulation be neutral toward competing intellectual perspectives, philosophies, and ideologies. It is not permissible for the University to apply one standard to professors who are feminists or post-structuralists, for example, and another to those who are positivists or libertarians — or Christians or Buddhists. The University's action, which openly discriminates against petitioner's religious viewpoint, contravenes the First Amendment.

From one generation to the next, the targets of academic intolerance shift. Where once persons of a vaguely left-wing ideology were drummed out of the academy on suspicion of being subversive, the right to teach from a Marxist point of view is now a commonplace. Today, the University of Alabama would never order a Marxist professor to stop interjecting his opinions in class or to cease from offering a "Marxist Perspective" to those who wished to attend an optional lecture. Such an action would be instantly, and properly, condemned by the University community. Professor Bishop is not so fortunate. His intellectual viewpoint commands little support in academia and is considered a source of embarrassment by his superiors. The ordinary processes of internal academic gover-

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[18]Petitioner testified that he does not consider it "ethical to intimidate or coerce" students to adopt the instructor's philosophy (Bishop Dep. at 77). It is undisputed that he was careful to identify his own classroom remarks as his personal belief or "bias," which the students were free not to share. Pet. App. A3.

nance have failed him. The First Amendment exists to protect the speaker, his students, and the public at large from the ideological prejudices of those in positions of authority in the University. The court of appeals erred gravely in abdicating that function. In this country, the freedom of a professor in a public university to teach is not limited to those who espouse a party line.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 14, 1991

APPENDIX

UNITED STATES COURT OF APPREALS
FOR THE ELEVENTH CIRCUIT

Phillip A. BISHOP, Plaintiff-Appellee,

v.

Aaron M. ARONOV, Winton M. Blount, O.H. Delchamps, Jr., Sandrall Hullett, Guy Hunt, William Henry Mitchell, John T. Oliver, Jr., Thomas E. Rast, Yetta G. Samford, Jr., Martha H. Simms, Wayne Teague, Cleophus Thomas, Jr., George S. Shirley, Cordell Wynn, all in their official capacities as members of the Board of Trustees of the University of Alabama, Defendants-Appellants.

No. 90-7230

United States Court of Appeals,
Eleventh Circuit

March 15, 1991

Kenneth L. Goodwin, Paul E. Skidmore and Stanley J. Murphy, University of Alabama System, Office of Counsel, Tuscaloosa, Ala., for defendants-appellants.

Albert L. Jordan, Wallace, Brooke & Byers, Birmingham, Ala., for plaintiff-appellee,

Appeal from the United States District Court for the Northern District of Alabama.

Before COX and BIRCH, Circuit Judges, and GIBSON*, Senior Circuit Judge.

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*The Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

FLOYD R. GIBSON, Senior Circuit Judge:

The University of Alabama through its Board of Trustees (the "University") appeals the district court's summary judgment and other orders in favor of Assistant Professor Phillip A. Bishop ("Dr. Bishop") enjoining the University from curtailing his speech and religion rights in certain respects.[1] We conclude that the action taken by the University did not transgress constitutional guarantees and proscriptions, and we now reverse.

I. BACKGROUND

Our review of the record reveals that a completely independent statement of the facts would not be useful. We do not disagree with the district court as to any facts, though our views diverge as to the controlling legal principles and the conclusions to be drawn from them. These questions of law we take up presently by a de novo review of the interplay between the facts and law. *See Jones v. Heyman*, 888 F.2d 1328, 1330-31 (11th Cir. 1989) (per curiam) (citations omitted). First, we largely adopt the district court's statement of the facts, quoting freely therefrom and supplementing it as necessary.

> Phillip A. Bishop has been employed as assistant professor in the Area of Health, Physical Education, and Recreation [HPER], in the College of Education at the University of Alabama and Director of its Human Performance Laboratory since 1984. He teaches exercise physiology, his specialty, to graduate and undergraduate students and supervises research problems and theses.
>
> During the fall of 1984 through the spring of 1987 Dr. Bishop occasionally referred to his religious beliefs during instructional time, remarks which he prefaced as personal "bias." Some of his references

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[1]The opinion of the district court is published as *Bishop v. Aronov*, 732 F.Supp. 1562 (N.D.Ala. 1990).

> concerned his understanding of the creative force behind human physiology. Other statements involved brief explantations of a philosophical approach to problems and advice to students on coping with academic stresses. In response to students' questions concerning academic research, publishing, tenure, or promotion, Bishop has suggested to the students that his religious beliefs are more important than academic production, and this perspective allows him to better cope with academic stresses. He never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time.

Bishop, 732 F.Supp. at 1563.

There are no transcriptions of Dr. Bishop's actual in-class comments. However, attached to his summary judgment motion is an affidavit wherein he affords us an approximation of his remarks.

> The statement [I made to the class] was generally something like the following:
>
> . . .
>
> > After giving it considerable thought, I have decided for myself when I die, I would like to leave behind something more important and valuable than a stack of technical papers. I think that people are important and eternal, paper is neither. I want to invest my time mainly in people. I personally believe God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness. Now this is simply my personal belief, understand, and I try to model my life after Christ, who was concerned with people, and I feel that is the wisest thing I can do. You need to recognize as my students that this is my bias and it colors everything I say and do. If that is not your bias, that is fine. You need, however, to filter everything I say

> with that (Christian bias) filter. If you observe something in my life that is inconsistent with Christianity, please let me know, because, I believe that it is much more important than a pile of papers.

Affidavit of Phillip A. Bishop at 2, attachment to Plaintiff's Motion for Summary Judgment, Record on Appeal, Vol. 2, Doc. 40 (Hereinafter "Bishop Affidavit").

> In April 1987 Bishop organized an after-class meeting for his students and other interested persons wherein he lectured on and discussed "Evidences of God in Human Physiology." Discussion covered various aspects of the human body including the complexity of its design and operation, concluding that man was created by God and was not the by-product of evolution. The class was attended by five Bishop students and one professor.
>
> [The University] contend[s] that the timing of the class before final exams created the possibility of a coercive effect upon his students, a situation which the Establishment Clause of the Constitution is designed to prohibit. Attendance at the class, however, was voluntary and did not affect grades. Bishop used a blind grading system.
>
> Some of Bishop's students in the 1986-87 classes complained about [Bishop's in-class] comments and the after-class meeting to [Carl] Westerfield [Bishop's supervisor and Head of HPER]. In late August or early September 1987 Westerfield met with the Dean of the College of Education, Rodney Roth, to discuss the complaints. After deciding Bishop's statements were inappropriate, they met with University counsel September 11, 1987.

Bishop, 782 F.Supp. at 1564.

Westerfield prepared a memorandum to "Dr. Phil Bishop" concerning his conduct. The memo regards "Religious Activities in a Public Institution" and reads as follows:

> Foremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms. From discourse with you and others, I feel that certain actions on your behalf are unwarranted at a public institution such as The University of Alabama and should cease. Among those actions that should be discontinued are: 1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a "Christian Perspective" of an academic topic is delivered. I must also remind you that religious beliefs and/or the strength of a belief can not be utilized in the decisions concerning the recruitment, admission or retention of graduate students.

Record Excerpt at 15.[2] (Hereinafter the "memo"). The tenor of this document demonstrates the first amendment tight rope upon which the University found itself perched. Without unnecessarily restricting the academic freedom of a faculty member, the University endeavored to avoid both Establishment Clause violations and undue pressure upon students. The University's counsel believed that under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (excessive entanglement between government and religion), Dr. Bishop's activities did amount to such violations, thus the University refused the professor's later requests to rescind the Westerfield order. In the interim, Dr. Bishop apparently complied with the University's wishes.

> In May 1988 Bishop [through letter of his counsel] petitioned the President of the University to rescind the order. [Bishop] was again advised there would be

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[2]This last sentence refers to a suggestion by Bishop to the faculty that the department make an effort to recruit graduate students who had strong Christian backgrounds and beliefs. The right of Bishop to make such suggestions or of the University to make such decisions is not before the court, though surely the former can, while the latter cannot.

> no rescission of the University prohibition and he should refrain from interjecting his religious preferences and/or beliefs not necessary to class discussion or class materials. The University viewed the holding of any optional class meeting to discuss religious implications of class material prior to the submission of final grades to be coercive and [,] therefore, prohibited.
>
> Numerous undisputed affidavits filed indicate University policy does not prohibit faculty members from engaging in non-religious classroom speech involving personal views on other subjects. Such discussions are the norm used to establish rapport between faculty and students. There is no University policy attempting to control the statements of faculty members as long as they do their job. Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective. The University has no policy proscribing professor involvement in extracurricular academic discussions with students.

Bishop, 732 F.Supp. at 1564.

In light of the continued restriction of his speech in a manner apparently contradictory to the University's erstwhile declarations of academic freedom, Dr. Bishop filed suit in federal district court against the Board of Trustees of the University in their official capacities under 42 U.S.C. § 1983, seeking only declaratory and injunctive relief for violations of his free speech rights by imposition of Westerfield's memo. The initial complaint also claimed that the memo was voidable for vague and overbroad restrictions of his free speech rights. By amendment to his complaint, Dr. Bishop also pleaded violations of his free exercise rights and his rights under the ninth amendment.[3] In significant parts the University's answer and amended answer generally denied any First and Ninth Amend-

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[3]All of Dr. Bishop's First Amendment claims against the University are, of course, made by incorporation through the Fourteenth Amendment.

ment violations and raised the Establishment Clause of the United States and Alabama Constitutions as affirmative defenses.

After cross-motions for summary judgment, the district court relied on *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and determined that "[t]he University has created a forum for students and their professors to engage in a free interchange of ideas[,]" *Bishop*, 732 F.Supp. at 1566, and that "Bishop's speech connected with his after-class meeting is part of an open exchange of ideas between students and faculty[,]" *id.* at 1567. The court concluded that the Westerfield memo was overbroad and vague because "[i]t reaches statements not violative of the Establishment Clause and fails to provide adequate notice of the proscribed speech." *Id.* at 1566. As for the University's claim of an Establishment Clause violation by Dr. Bishop's actions, the district court found that his conduct had a primarily secular purpose which did not amount to an establishment of religion under *Lemon*. *Id.* at 1567.

The district court summed up its thinking as follows:

> The University has no interest sufficient to justify restricting a professor's freedom to make occasional classroom comments about personal religious beliefs or to restrict him from holding after-class meetings with students on state university property to discuss a Christian perspective on academic topics. [Bishop] is entitled to summary judgment.

Id. at 1568. The final order entered by the district court granted summary judgment to Dr. Bishop and otherwise ordered that 1) the University be "enjoined from taking any action restricting [Dr. Bishop]'s first amendment rights of academic speech and religion[;]" 2) the University be "enjoined from restricting [Dr. Bishop]'s classroom speech as long as it does not exceed the parameters of speech outlined in this opinion[;]" 3) "[Dr. Bishop] be allowed to hold his special class in a University building only if permission is sought and

only if he assures the class that a blind grading system is used[;]" 4) "the University may not unreasonably withhold permission for the plaintiff to hold his special class in a University building[;]" and 5) "if [Dr. Bishop] decides to hold his special class at some place other than a University building he must assure the class that a blind grading system is used." *Id.* at 1569. The University appeals this final order of summary judgment.

II. DISCUSSION

A. Open Forum

First amendment doctrines are manifold, and their diverse facts and analyses may reveal but one consistent truth with respect to the amendment — each case is decided on its own merits. Nevertheless, a correct legal analysis must predicate proper explication of the constitutionally pivotal facts. This is not a forum case. We disagree with the district court's conclusion that a university classroom is an open forum during instructional time.

In deciding that a school newspaper published by a journalism class was not a public forum, the Supreme Court restated the examination to be made:

> [S]chool facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 [103 S.Ct. 948, 956, 74 L.Ed.2d 794] (1983), or by some segment of the public, such as student organizations. *Id.* at 46, n. 7 [103 S.Ct. at 955 n. 7] (citing *Widmar v. Vincent*). If the facilities have instead been reserved for other intended purposes . . . then no public forum has been created, and school officials may impose *reasonable restrictions* on the speech of students, teachers, and other members of the school community.

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S.Ct. 562, 568, 98 L.Ed.2d 592 (1988) (emphasis added). While the University may make its classrooms available for other purposes, we have no doubt that during instructional periods the University's classrooms are "reserved for other intended purposes," *viz.*, the teaching of a particular university course for credit. Thus, we hold that Dr. Bishop's classroom is not an open forum. The next issue to determine is whether the University by its memo has reasonably restricted Dr. Bishop's speech or exercise rights therein.

B. Free Speech[4]

1. *Overbreadth*

First we take Dr. Bishop's facial charges of overbreadth and vagueness, for if correct, no closer, substantive inquiry would be necessary. However, we find the memo's restrictions to be neither overbroad nor vague. We recognize that the memo is less than ideal. While counsel for Dr. Bishop has raised several nice questions about the reach of the memo, they are more imagined than genuine. The restrictions reach only course-related, in-class remarks of Dr. Bishop and his "optional" classes. We take this view of the memo under our "obligation to construe the challenged [restrictions] narrowly[.]" *See American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990). "It has long been a tent of First Amendment law that in determining a facial challenge to a statue [here the memo], if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Id.* (quoting *Virginia v. American Booksellers Association*, 484 U.S. 383, 397, 108 S.Ct. 636, 644-45, 98 L.Ed.2d 782 (1988) (citations omitted) (subsequent history omitted)) (footnote omitted).

Because the University's memo responded to particular conduct by Dr. Bishop, we believe it can be said to be " 'readily

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[4]"Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const. amend. I.

susceptible' to a narrowing construction." We conclude that the University' restrictions as expressed in its memo are sufficiently narrow and clear to put Dr. Bishop on notice of what he cannot do and do not reach otherwise protected speech. We are confident that, as a professional, Dr. Bishop knows that the University asks only that he separate his personal and professional beliefs and that he not impart the former to his students during "instructional time" or under the guise of the courses he teaches in so-called optional classes.

To suggest that the memo is vague (and a vagary) Dr. Bishop has tried to make much of the fact that the University has no policy for limiting the speech of its professors only to their subject areas. One would not expect to find such a policy, and to the contrary, as one would expect, there are various indications (as in the memo itself) that the University generally endorses academic freedom for its faculty. *See Bishop*, 732 F.Supp. at 1564. Dr. Bishop has filed numerous affidavits by other instructors at the University describing their extra curricular speech in the classroom as efforts to reach out to students. *Id.* These attempts at professor-student affinity are laudable. But plainly some topics understandably produce more apprehension than comfort in students. Just as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes, much less seek camaraderie by trying to discover "something in [Dr. Bishop's] life that is inconsistent with Christianity." Bishop Affidavit at 2. The opposite effect was apparently achieved. There is no suggestion that any other professor has produced student complaints or struck constitutional chords. Because the University may heretofore not have restricted the classroom speech of any other professor does not make out a case of overbreadth, vagueness, or infringement as to Dr. Bishop.

2. *Much Extant (but ultimately inconclusive) Case Law*

Though the religion clauses are implicated because of the indisputably religious character of Dr. Bishop's remarks, the

primary analysis that must be made here ascends from the cases that discuss the free speech rights of public teachers.[5] While neither teachers nor students "shed their constitutional rights to [free speech] at the schoolhouse gate[,]" *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

> the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). Teachers cannot suffer reprisal for speaking on a matter of public concern by speech which they would be entitled to make as private persons unless that speech "impeded [their] proper performance of . . . daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.* at 572-73, 88 S.Ct. at 1737 (footnote omitted). Though *Pickering* addresses only out-of-school speech by teachers, we take it as our starting point because of the balancing it suggests. In and out of school, some balance must be reached.[6]

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[5]A thoughtful examination of the speech rights of teachers is made in Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U.L.Rev. 693 (1990). The article suggests a balancing approach somewhat like the one we will endeavor to apply. The article, however, weighs teacher autonomy more heavily than we have concluded is proper under *Kuhlmeier*.

[6]In a case decided soon after *Pickering*, the former Fifth Circuit noted the necessity of framing a balance between school and teacher interests. *Pred v. Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851, 855-59 (5th Cir. 1969). Though the case only reversed for improvident dismissal of the

The following term, the Supreme Court decided *Tinker*. The Court encountered the free expression rights (exercised by wearing black armbands) claimed by students. The case describes a standard by which to gauge restriction of in-class expression:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Burnside v. Byars, [363 F.2d 744], 749 [(5th Cir. 1966)].

> In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.

Tinker, 393 U.S. at 509, 89 S.Ct. at 738. While *Tinker* deals with in-class conduct, and reiterates the belief that such conduct cannot be entirely unfettered, the case involves students, not teachers. We do not believe that the "material and substantial interference" test applied to student expression can control this case.

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teacher's complant by the district court and did not reach any facts of record or suggest a particular analysis, the opinion by then-Chief Judge John R. Brown provides a helpful discussion of the relevant First Amendment law to date.

The Tenth Circuit has recently decided a more factually similar case that instructively relies on *Tinker* to evaluate a school's decision to require a fifth-grade teacher to remove certain texts from his classroom library and to refrain from silently reading the Bible during an in-class reading time. *Roberts v. Madigan*, 921 F.2d 1047, 1056-57 (10th Cir. 1990). However, the real foundation for our Sister Circuit's conclusion seems to be *Kuhlmeier*. Thereunder, the Tenth Circuit found support for restriction of a teacher's activity where "the [teacher's] conduct endorses a particular religion and is an activity 'that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school[.]' " *Id.* at 1057 (quoting *Kuhlmeier*, 484 U.S. at 271, 108 S.Ct. at 569).

The key difference between *Roberts* and *Tinker* lies in the actor. While a student's expression can be more readily identified as a thing independent of the school, a teacher's speech can be taken as directly and deliberately representative of the school. Hence, where the in-class speech of a teacher is concerned, the school has an interest not only in preventing interference with the day-to-day operation of its classrooms as in *Tinker*, but also in scrutinizing expressions that "the public might reasonably perceive to bear [its] imprimatur[.]" *Id.*

This Court has also indicated how *Tinker* can be distinguished from *Kuhlmeier*. In *Alabama Student Party v. Student Government Association*, 867 F.2d 1344 (11th Cir. 1989), then-Chief Judge Roney wrote:

> The [Supreme] Court recognized there is a difference between speech a school must *tolerate* and speech a school must affirmatively promote. In [*Kuhlmeier*], the school could determine what was appropriate in a school-sponsored student newspaper when that newspaper was legitimately part of the learning experience, the curriculum, of the school.
>
> . . . .
>
> The University should be entitled to place reasonable restrictions on this learning experience.

Id. at 1347 (emphasis in original).

The question becomes to what degree a school may control classroom instruction before touching the First Amendment rights of a teacher. "Courts agree . . . that the school's administration may at least establish the parameters of focus and general subject matter of curriculum." *Mahoney v. Hankin*, 593 F.Supp. 1171, 1174 (S.D.N.Y. 1984) (citing *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S.Ct. 2148, 36 L.Ed.2d 695 (1973)). *Mahoney* goes on to discuss two circuit court decisions that weigh the interests of the school against the "teacher's pedagogical choices." *Id.* at 1175 (citing *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) (per curiam) and *East Hartford Educ. Association v. Board of Ed. of Town of East Hartford*, 562 F.2d 838, 843-44, *vacated on rehearing en banc*, 562 F.2d 856 (2d Cir. 1977)) (footnote omitted).

The Second Circuit case dealt with a faculty dress code that was upheld on summary judgment by the district court and ultimately upheld by the Second Circuit sitting *en banc*. Judge Meskill wrote the opinion for the *en banc* majority. His dissent from the panel opinion included the following salient remark: "the First Amendment leaves undisturbed the power of local officials to prescribe the curriculum and teaching techniques of the schools in their care." *East Hartford*, 562 F.2d at 851 (Meskill, J., dissenting) (footnote omitted). The First Circuit case dealt with the dismissal of a public school teacher for an alleged violation of a Code of Ethics. Though a brief per curiam, the opinion remarks astutely that:

> free speech does not grant teachers a license to say or write in class whatever they may feel like, and . . . the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the context and manner of presentation.

Mailloux, 448 F.2d at 1243. Yet, neither of these cases precisely matches the facts of our case. Thus, as the First Circuit further noted, "we see no substitute for a case-by-case inquiry into

whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech." *Id.*

3. *Our Suggested And Applied Balance*

Because there are no cases satisfactorily to point with this one to adopt as controlling, we must frame our own analysis to determine the sufficiency of the University's interests in restricting Dr. Bishop's expression in the classroom. The balance we suggest, though somewhat amorphous, takes as its polestar *Kuhlmeier*'s concern for the "basic educational mission" of the school which gives it authority by the use of "reasonable restrictions" over in-class speech that it could not censor outside the classroom. *Kuhlmeier*, 484 U.S. at 266-67, 108 S.Ct. at 567-68 (citations omitted).

> [W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student [or professor] expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.
>
> This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.

Id. at 272-73, 108 S.Ct. at 570-71 (footnotes and citations omitted). *Kuhlmeier*, like most cases we have encountered, dealt with students at the secondary level. Yet, insofar as it covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the

Court's reasoning as suitable to our ends, even at the University level.

In an effort to calibrate the Constitution in this case, we contemplate much. First and foremost, we consider the context: the university classroom during specific in-class time and the visage of the classroom as part of a university course in an after-class meeting. This context also leads us to consider the coercive effect upon students that a professor's speech inherently possesses and that the University may wish to avoid. The University's interest is most obvious when student complaints suggest apparent coercion — even when not intended by the professor.

Second, it follows, we consider the University's position as a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons. As a place of schooling with a teaching mission, we consider the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time. Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university.

Last and somewhat countervailing, we consider the strong predilection for academic freedom as an adjunct for the free speech rights of the First Amendment. There are abundant cases which acclaim academic freedom. Perhaps the most applicable is *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), in which Justice Brennan wrote:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcending value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of

> American school." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Id. at 603, 87 S.Ct. at 683-84 (citations omitted). *Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths. The Court's pronouncements about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses. As this court has said in a case deciding the power of the University to regulate student government elections:

> The University judgment on matters such as this should be given great deference by federal courts. This Court should honor the traditional "reluctance to trench on the prerogatives of state and local educational institutions." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 514, 88 L.Ed.2d 523 (1985). The reason for this is that "[a]cademic freedom thrives not only on the independent uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Id.* at 226 n. 12, 106 S.Ct. at 514, n. 12 (citations omitted). In the present case, and in other school cases raising similar First Amendment challenges, these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission.

Alabama Student Party, 867 F.2d at 1347; *see also Virgil v. School Bd. of Columbia County, Fla.*, 862 F.2d 1517, 1520 (11th Cir. 1989) ("[i]n matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity.") (citing *Kuhlmeier*).

Though we are mindful of the invaluable role academic

freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom. University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.

With these considerations in mind, we turn to the case at hand. The University, by its memo from Dr. Westerfield, responded to complaints about Dr. Bishop's religious references by some of his students and, therefore, restricted the instructional activities of Dr. Bishop as to religious intimations. The restrictions placed on Dr. Bishop by the University were that he refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." Record Excerpt at 15.

We read the memo's restrictions narrowly because they implicate First Amendment freedoms. They apply only to the classroom speech of Dr. Bishop — wherever he purports to conduct a class for the University. At those times and places, he may not interject his religious views into the course material. Of course, if a student asks about his religious views, he may fairly answer the question. Under the memo, the University seeks only to prevent Dr. Bishop from making assertions about his religious beliefs vis-a-vis the subject matter of his courses.

Dr. Bishop has expressed certain personal (perhaps even professional) opinions about his work that happen to have a religious source.[7] The University has concluded that these

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[7]In this respect, Dr. Bishop's efforts to identify a personal bias, present it to his students, and hold it up for criticism are admirable. We are not convinced, however, that Dr. Bishop has fully comprehended the separation

opinions should not be represented in the courses he teaches at the University. The University has not suggested that Dr. Bishop cannot hold his particular views; express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them; nor could it so prohibit him. The University has simply said that he may not discuss his religious beliefs or opinions under the guise of University courses.

The University's chief concern is that its courses be taught without personal religious bias unnecessarily infecting the teacher or the students. Dr. Bishop's interest in academic freedom and free speech do not displace the University's interest inside the classroom. Contrary to the district court, *Bishop*, 732 F.Supp. at 1568, we find that the University's interests in the classroom conduct of its professors are sufficient, in the balance we have suggested, to warrant the reasonable restrictions it has imposed on Dr. Bishop. Under the analysis by which we have examined the University's action, we do not discover an infringement of Dr. Bishop's free speech rights.

As for the after-class meetings, the University has concluded that meetings on the evidence of God in human physiology or from a "Christian perspective" cannot be conducted by Dr. Bishop in a manner that connects them to the courses he teaches. The University has not suggested that Dr. Bishop cannot organize such meetings, make notice of them on campus, or request University space to conduct them; nor could it so prohibit him. The University has simply said he may not hold such meetings as classes related to the courses he teaches. The

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of his personal views from his professorial duties that the University demands. He has said that his Christian perspective touches everything he says and does. In this regard, while we respect Dr. Bishop's professional views as informed by his religious beliefs, we point out that the two have to be conceptually separated for fair analysis. That is, simply renaming religious views as professional, no matter how well-founded (and we are in no position to gauge that) does not deny the authority of his employer to request that he sequester the personal from the professional nor dismiss the specter of an establishment violation.

phrasing "optional class" or "optional meeting" and the scheduling before finals gave the impression of official sanction, which might have unduly pressured students into attending and, at least for purposes of examination, into adopting the beliefs expressed by Dr. Bishop. The University may seek to avoid these consequences, even where unintended. Conversely, when Dr. Bishop makes it plain to his students that such meetings are not mandatory, not considered part of the course work, and not related to grading, the University cannot prevent him from conducting such meetings, nor has it.

Fairly read, the phrasing "optional classes" in the University's memo plainly requires Dr. Bishop to completely disassociate such meetings from his courses. This simple restriction, put into the applicable balance we have outlined, is reasonable and supported by sufficient University interests as we have indicated. Again, we do not discover an infringement of Dr. Bishop's free speech rights.

In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute. Though Dr. Bishop's sincerity cannot be doubted, his educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments. By its memo to Dr. Bishop, the University seeks to prevent him from presenting his religious viewpoint during instructional time, even to the extent that it represents his professional opinion about his subject matter. We have simply concluded that the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings.

C. The Religion Clauses[8]

1. *Free Exercise*

Though Dr. Bishop's amended complaint raises his exericse rights, we find his arguments do not merit our close attention. As we have noted, the religious facets of this case cloud its true countenance. We are not persuaded that, even in the remotest sense, Dr. Bishop's rights of free exercise or worship as those concepts are comprehended in constitutional parlance are implicated. He has made no true suggestion, much less demonstration, that any proscribed conduct of his impedes the practice of his religion. In fact, he has been careful to avoid ascribing his beliefs to a particular religion and to avoid describing his conduct as so connected, other than to say his values are Christian in a broad and unspecific sense. Furthermore, the University's restrictions on him are not directed at his efforts to practice religion, *per se,* but rather are directed at his practice of teaching. If either Dr. Bishop's or the University's conduct truly went to the exercise of religion by Dr. Bishop, no doubt the Establishment Clause would resolve the case. As it is before us, we see no free exercise question.

2. *Establishment of Religion*

The University issued its memorandum purportedly to avoid an establishment of religion by Dr. Bishop's conduct which connected the University to a particular religious viewpoint. Such a connection can give the impression that the University sponsors that viewpoint. Because of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the University. If a clear establishment violation existed, this case would be over, without resort to the evaluation we have already made. *See*

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[8]"Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof. . . . " U.S. Const. amend. I.

Roberts, 921 F.2d at 1053-56. While we do not reach the question, we note that Dr. Bishop's optional class was particularly suspect. The creation/design aspect of his lecture could have lent itself to an analysis as found in *Edwards v. Aquillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). In any event, we do not reach the establishment questions raised by Dr. Bishop's conduct. The University can restrict speech that falls short of an establishment violation, and we have already disposed of the University's restrictions of Dr. Bishop under the free speech clause.

On the other hand, Dr. Bishop has suggested that the University's restrictions are themselves an establishment of religion because they exclude only Christian viewpoints. We disagree. Applying *Lemon*, 1) the University's restrictions have only a secular purpose — by limiting Dr. Bishop's religious remarks the University does not endeavor to promote other religions or religious viewpoints; 2) the restrictions neither advance nor inhibit religion — to the contrary, the University has simply attempted to maintain a neutral, secular classroom by its restrictions on Dr. Bishop's expressions; and finally, 3) the University's restrictions do not promote excessive entanglement with religion — again, the University seeks only to extricate itself from any religious influence or instruction in its secular courses. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

We also note that the memo excludes Christian viewpoints alone because it is addressed to Dr. Bishop, who expressed them alone. No other complaints presented to the University as to other religious viewpoints are before the court. Should another professor express religious beliefs in the classroom, the University would likely produce a similar memo. Heretofore, the University has apparently not found it necessary to remind its faculty that the expression of a religious position in a secular subject, no matter how carefully presented, creates the appearance of endorsement of that position by the University and engenders anxiety in students who may feel compelled to feign a similar belief and, worse still, deny their own beliefs. By its effort to avoid endorsement of Dr. Bishop's reli-

gious ideas in its classrooms, the University's memo does not create an establishment of religion.

III. CONCLUSION

We hold that the University's restrictions with respect to classroom conduct issued under its authority to control curriculum do not infringe the free speech or free exercise rights of Dr. Bishop as discussed above. The memo proscribes particular conduct of Dr. Bishop so that he can know what the University does not want him to do. However, balanced against the interests of academic freedom, the memo cannot proscribe Dr. Bishop's conduct to an extent any greater than we have indicated by our opinion.

We also hold that the memo's restriction with respect to the optional after-class meeting did not infringe on Dr. Bishop's free speech or free exercise rights. Under its authority to control curricular conduct, the University may restrict a professor from conducting an "extra" or "optional" class or meeting under the patronage of a university course. In particular, scheduling the class directly before finals and describing it as an "optional class" can be prohibited to avoid the apparent sponsorship of the University. However, like the district court, we hold that the University cannot prevent Dr. Bishop from organizing such a meeting for interested persons, either on or off University grounds. Should Dr. Bishop again conduct such meetings and invite his students, the University may direct that Dr. Bishop make it clear to students that the meeting is neither required for course credit nor sanctioned by the University and that Dr. Bishop employ blind-grading and so assure students.

We do not reach the question of establishment of religion by Dr. Bishop.[9] While the University acted on its conclusions

[9]We also do not reach the Alabama Constitution or the ninth amendment of the United States Constitution. Dr. Bishop only pleaded the ninth amendment in the barest language. His appellate arguments do not even attempt to skeletally state a ninth amendment case. Whatever rights the

in that regard, we hold that its memo was reasonable and within its powers to control the content of curriculum in the classroom, regardless of the Establishment Clause. The University necessarily has dominion over what is taught by its professors and may so manage them. We finally hold that the University's memo does not create an establishment of religion; rather, it seeks to avoid an entanglement with religion and furthers the unstated but accepted principle of separation of church and state.

We direct the district court to enter summary judgment for the University and against Dr. Bishop consistent with this opinion. As indicated, the judgment and order of the district court are

REVERSED.

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ninth amendment does ensconce, we are confident that Dr. Bishop's case arises and concludes under the first amendment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Phillip A. BISHOP, Plaintiff,

v.

Aaron M. ARONOV, Winton M. Blount, O.H. Delchamps, Jr., Sandral Hullett, Guy Hunt, William Henry Mitchell, John T. Oliver, Jr., Thomas E. Rast, Yetta G. Samford, Jr., Martha H. Simms, Wayne Teague, Cleophus Thomas, Jr., George S. Shirley, Cordell Wynn, all in their official capacities as members of the Board of Trustees of the University of Alabama, Defendants.

Civ. A. No. 88–G–1591–S.

United States District Court,
N.D. Alabama, S.D.

Feb. 26, 1990.

Albert L. Jordan, Wallace Brooke & Byers, Birmingham, Ala., for plaintiff.

Kenneth L. Goodwin, Paul E. Skidmore, and Stanley J. Murphy, University of Alabama System Office of Counsel, Tuscaloosa, Ala., for defendants.

MEMORANDUM OPINION

GUIN, District Judge.

In the case at bar the court has been asked to decide whether there has been a violation of the Establishment Clause of the Constitution, set forth below, in light of the actions of both the plaintiff and the defendants [hereinafter the University]:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech . . .

Plaintiff Phillip A. Bishop has been employed as assistant professor in the Area of Health, Physical Education, and Recreation, in the College of Education at the University of Alabama and Director of its Human Performance Laboratory since 1984. He teaches exercise physiology, his specialty, to graduate and undergraduate students and supervises research problems and theses.

During the fall of 1984 through the spring of 1987 Dr. Bishop occasionally referred to his religious beliefs during instructional time, remarks which he prefaced as personal "bias." Some of his references concerned his understanding of the creative force behind human physiology. Other statements involved brief explanations of a philosophical approach to the problems and advice to students on coping with academic stresses. In response to students' questions concerning academic research, publishing, tenure, or promotion, Bishop has suggested to the students that his religious beliefs are more important than academic production, and this perspective allows him to better cope with academic stresses. He never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time.

Bishop is regarded as an excellent professor by his supervisor, Head of the Health, Physical Education and Recreation Department, Carl Westerfield, who recommended him for early tenure. Defendants admit he is a capable teacher.

Bishop has an excellent record of publishing. Since 1984 he has authored or co-authored more published articles in journals related to his academic discipline than any other assistant professor in the area of health, physical education, and recreation at the University.

In April 1987 Bishop organized an after-class meeting for

his students and other interested persons wherein he lectured on and discussed "Evidences of God in Human Physiology." Discussion covered various aspects of the human body including the complexity of its design and operation, concluding that man was created by God and was not the by-product of evolution. The class was attended by five Bishop students and one professor.

Defendants contend the timing of the class before final exams created the possibility of a coercive effect upon his students, a situation which the Establishment Clause of the Constitution is designed to prohibit. Attendance at the class, however, was voluntary and did not affect grades. Bishop used a blind grading system.

Some of Bishop's students in the 1986-87 classes complained about the comments and the after-class meeting to Westerfield. In late August or early September 1987 Westerfield met with the Dean of the College of Education, Rodney Roth, to discuss the complaints. After deciding Bishop's statements were inappropriate, they met with University counsel September 11, 1987. Thereafter, Westerfield drafted Bishop a memorandum instructing him to refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." The plaintiff has complied with the directive.

Although Bishop tried to have the order rescinded during the fall of 1987, his efforts were unsuccessful. The University, upon the advice of University counsel, advised him that as owner of the teaching facilities the University had the right to establish curriculum: it had not improperly interfered with academic freedom. It has a duty to act against Bishop to prevent an establishment of religion under the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *reh'g denied*, 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971), set forth below:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . .; finally, the statute must not foster "an excessive government entanglement with religion." (Citations omitted).

Id., 403 U.S. at 612-13, 91 S.Ct. at 2111, 29 L.Ed.2d at 755 (interpretation of statutes providing state aid to church-related elementary and secondary schools).

University counsel opined that Bishop's comments lacked a secular purpose and had the effect of benefiting one religious point of view.

In May of 1988 Bishop petitioned the President of the University to rescind the order. He was again advised there would be no rescission of the University prohibition and he should refrain from interjecting his religious preferences and/or beliefs not necessary to class discussion or class materials. The University viewed the holding of any optional class meeting to discuss religious implications of class material prior to the submission of final grades to be coercive and therefore, prohibited.

Numerous undisputed affidavits filed indicate University policy does not prohibit faculty members from engaging nonreligious classroom speech involving personal views on other subjects. Such discussions are the norm used to establish rapport between faculty and students. There is no University policy attempting to control the statements of faculty members as long as they do their job. Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective. The University has no policy proscribing professor involvement in extracurricular academic discussions with students.

Plaintiff filed suit September 21, 1988, against the individual members of the University Board of Trustees in their official capacities. The complaint, as amended, claims violations of his first and ninth amendment rights of speech and

religion, applicable to the states through the fourteenth amendment. *Baird v. State Bar,* 401 U.S. 1, 5, 91 S.Ct. 702, 705, 27 L.Ed.2d 639 (1971). He further claims the restrictions to be vague and over broad.

In answer, the defendants claim it was their duty to restrict Bishop's speech which was violative of both the Establishment Clause of the United States Constitution and the Establishment Clause of the Alabama Constitution, article 1, section 3.

Cross motions for summary judgement were filed.

These facts necessitate interpretation of the Establishment Clause, specifically the following issues:

1. Does the University have the right to limit the topics which may be discussed in its classes?
2. Does a state university interest in preventing an establishment of religion authorize it to restrict its professors' freedom to make occasional classroom statements about personal religious views?
3. Does the same interest justify restricting a professor from holding after-class meetings with students on state university property to discuss a Christian perspective on academic topics?
4. Are the defendant's restrictions void for vagueness or because they are over broad?
5. Do the activities of Dr. Bishop violate the Establishment Clause of the first amendment?

While the law recognizes the right of universities to control the use of its faculties and the subject matter taught therein, it, nevertheless, has established that the first amendment rights of speech and association extend to the campuses of colleges and universities. Any restriction on those rights require strict scrutiny. *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (State university's refusal to grant student religious groups access to university facilities generally open to student groups, held unjustifiable, content based exclusion of religious speech). *Widmar* stands squarely for the proposition that government cannot redefine, under the guise of "aca-

demic judgement," an otherwise open forum to exclude religious matters.

University professors are entitled to freedom of speech in their jobs. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Pertinent portions follow:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." . . . In *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. ed [sic] 2d 1311, 1324, 77 S Ct 1203 [1211], we said:
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> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new

> maturity and understanding; otherwise our civilization will stagnate and die."
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> . . . . .
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> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterances may lose him his position, one necessarily will "steer far wider of the lawful zone. . . ."

Id. 385 U.S. at 603, 87 S.Ct. at 683, 17 L.Ed.2d at 640–41. *See Healy v. James,* 408 U.S. 169, 180–81, 92 S.Ct. 2338, 2345–46, 33 L.Ed.2d 266 (1972) ("The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.' "); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969) (extended the rights of free speech under the first amendment into the classroom when it held neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Sweezy v. New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), *reh'g denied,* 355 U.S. 852, 78 S.Ct. 7, 2 L.Ed.2d 61 (1957), (classroom advocacy of Marxism).

Since the University has taken the position that plaintiff has no first amendment right of expression at stake in its decision restricting inclusion of religious matters in his courses, any effort to exclude religious matters from Dr. Bishop's speech must be carefully scrutinized. The University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar,* 454 U.S. at 270, 102 S.Ct. at 274, 70 L.Ed.2d at 448. It is not enough to say the plaintiff is free to believe as he wishes or free to act on his beliefs when he is not performing duties within the scope of his employment.

The interests of the state must be balanced against the rights of free speech of faculty members. *Trotman v. Board of Trustees of Lincoln University,* 635 F.2d 216 (3d Cir.1980), *cert. denied, Lincoln University v. Trotman,* 451 U.S. 986, 101 S.Ct.

2320, 68 L.Ed.2d 844 (1981). Faculty members are at liberty to divulge personal views in the classroom as long as they are not disruptive of classroom activities. *Cooper v. Ross,* 472 F.Supp. 802, 810 (E.D.Ark.1979). The *Cooper* court held an instructor's announcement that he was a communist did not "materially or substantially disrupt his classes." *Id.* It concluded that "in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his students of his personal political and philosophical views." The court did not extend its holding to imply that a teacher has the right to proselytize students or to devote so much of class time to such matters that instruction of the subject matter is impaired. *Id.* at 811 n. 5. Neither does this court. Bishop's actions do not rise to that level. Expression of his personal views has not been disruptive and has not interfered with his teaching which is viewed as commendable.

The University has created a forum for students and their professors to engage in a free interchange of ideas. It may not exclude disfavored religious speech unless the exclusion is necessary to further a compelling governmental interest and narrowly tailored to further that interest. The plaintiff maintains the University's restriction, rather than being specifically tailored, is vague and over broad. He steers away from legitimate areas of study: theories of physiology as taught in medieval European universities—evolution—Creationism. Since their study would necessarily "interject religious beliefs" or "Christian Perspective," he is uncertain if their mention is banned by the University restriction.

The Court holds the University restriction which limits all expression of personal religious views as "unwarranted" is vague and over broad. It reaches statements not violative of the Establishment Clause and fails to provide adequate notice of the proscribed speech. The state's interest in disestablishment cannot overcome federal free speech rights. *Widmar,* 454 U.S. at 275–76, 102 S.Ct. at 277.

The University's only justification for exclusion is an effort to avoid an establishment of religion. This is not sufficiently

compelling to support a content-based discrimination against plaintiff's extracurricular on-campus discussions with students or his in-class statements. Bishop's speech connected with his after-class meeting is part of an open exchange of ideas between students and faculty. As such it is protected by the first amendment. A meeting between Bishop and students to discuss subjects of mutual interest is consistent with the University's educational purpose and consistent with the practices of other professors who participate in such meetings. Furthermore, a court sees no difference in constitutional principle between Bishop's addressing a Christian student organization on campus, announcing to his students that he would be speaking, and inviting them to attend the meeting, as allowed by Dr. Westerfield, and Bishop's making the comments to his classes, either regular or optional, which are the subject of his suit.

In light of *Lemon*, supra, neither Bishop's comments nor his optional class runs afoul of the Establishment Clause. His conduct has a secular purpose. Education is secular when it encompasses exposure to "how" and "why" things are. His comments constitute a discussion of means and origins, a legitimate educational topic. Their primary effect does not advance or inhibit religion. They do not foster excessive government entanglement with religion. Accordingly, defendants' restrictions are unjustified. While the University has directed the court to four cases dealing with Establishment Clause issues wherein an employee of a governmental entity engaged in an activity without the approval of or against the instructions of his employer, none of the decisions was handed down by a court of last resort or by a United States Circuit Court of Appeals. Furthermore, plaintiff has not engaged in prohibited activities since notification by the University he was to cease.

While the defendants have prohibited the plaintiff from holding an optional after-class meeting, they have not prohibited other professors from organizing after-class activities on nonreligious subjects and have not prohibited a professor from conducting optional classes in which he discusses

nonreligious perspectives on academic topics. Dr. West[erfield] has stated that the prohibition does not even apply to other Christian groups. The Supreme Court has ruled that once a university has opened its facilities for use by student groups it cannot exclude other groups because of the content of their speech. *Widmar,* 454 U.S. at 273, 102 S.Ct. at 276. Any religious benefits stemming from an open forum are incidental. The open forum does not "confer any imprimatur of State approval on religious sects or practices." *Id.* at 274, 102 S.Ct. at 276. Nor does it "confer any imprimatur of State approval" on nonreligious groups who may, also, avail themselves of the open forum. This principle is applicable to the case at the bar.

Widmar further affirmed lower court holdings that no excessive entanglement existed from allowing extracurricular meetings on campus. The neutral policy itself avoided excessive entanglement. Enforcement of exclusions on religious speech would constitute a greater risk of entanglement. *Widmar,* 454 U.S. at 272 n. 11, 102 S.Ct. at 275 n. 11, 70 L.Ed.2d at 449 n. 11.

In *Roemer v. Department of Public Works,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), by following the *Lemon* criteria, the court held that the Establishment Clause was not violated by a Maryland statute authorizing public funding of private religiously oriented colleges. In an atmosphere where academic freedom is practiced, public funding of the college does not necessarily have the primary effect of advancing religion.

In light of *Widmar* and *Roemer,* Bishop's classroom comments and after-class meetings do not primarily advance religion. There is no evidence anyone believes his comments are anything other than his personal "bias" or that his religious views are in the least way sponsored by the state. Some comments are in response to student questions indirectly related to course work, such as research, tenure, promotion or publishing. They in no way present nearly so great an opportunity for influence or entanglement as do scheduled university courses on religion or theology, which are acceptable to the

University. *See Roemer*, supra. Nevertheless, while the University admits the teaching of these courses does not constitute an establishment of religion, it has issued a memorandum prohibiting professors teaching those courses from stating personal religious views.

Justice Steven's concurring opinion in *Widmar* rejected the Establishment Clause concern expressed by the University.

> [T]he University has not established a sufficient justification for its refusal to allow the Cornerstone group to engage in religious work on the campus. The primary reason advanced for the discriminatory treatment is the University's fear of violating the Establishment Clause. But since the record discloses no danger that the University will appear to sponsor any particular religion, and since student participation in the Cornerstone meetings is entirely voluntary, the Court properly concludes that the University's fear is groundless. With that justification put to one side, the University has not met the burden that is imposed on it by Healy.
>
> . . . . .
>
> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.

454 U.S. at 280–81, 102 S.Ct. at 279–80, 70 L.Ed.2d at 454-55.

It would be clearly violative of the first amendment to allow presentation of one side of a debatable public question an advantage while suppressing the other. The University's directive is inconsistent. While it precludes discussion of academic subjects from a "Christian Perspective," it does not ban Jewish, Moslem, Hindu, Taoist, or other religious perspectives of course work.

The real issue in an Establishment Clause inquiry is the extent of state involvement. The government must be careful not to establish or condone any relationship with its citizens in which the government, by statute, or policy or practice, exerts influence over a person's religious beliefs. The court doubts that the plaintiff's minimal comments exert influence on the religious beliefs of college or graduate students. The court finds no merit to defendants' arguments that plaintiff's activities will lead to excessive government entanglement with religion. It further finds the University's comment that it would be forced to monitor plaintiff's speech and that of other faculty members "to make judgments about which statements are permissible and which statements are not permissible" a reflection of a seriously erroneous misunderstanding of the first amendment. Such monitoring would be an especially offensive violation of that amendment.

For the reasons set forth in this opinion the court holds the plaintiff has not violated the Establishment Clause of the Constitution. In so holding, it enjoins the University from restricting his first amendment rights. The University has no interest sufficient to justify restricting a professor's freedom to make occasional classroom comments about personal religious beliefs or to restrict him from holding after-class meetings with students on state university property to discuss a Christian perspective on academic topics. The plaintiff is entitled to summary judgment.

An order consistent with this opinion is being entered contemporaneously herewith. That order will contain a qualification of the allowance of the special class that the class be assured that a blind grading system is used.

FINAL ORDER GRANTING
SUMMARY JUDGEMENT

This cause comes before the court on cross motions for summary judgment. Having considered the motions, the pleadings, the submissions of counsel, and the applicable law,

the court is of the opinion that judgment is due the plaintiff as a matter of law, there being no genuine issue of material fact and there being no just reason for delay in entering a final judgment. Accordingly, in conformity with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment be and is hereby DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff's motion for summary judgment be and it hereby is GRANTED, and it is

FURTHER ORDERED, ADJUDGED and DECREED that defendants be and they hereby are ENJOINED from taking any action restricting plaintiff's first amendment rights of academic speech and religion. It is

FURTHER ORDERED, ADJUDGED and DECREED that the defendants be and they hereby are ENJOINED from restricting the plaintiff's classroom speech as long as it does not exceed the parameters of speech outlined in this opinion. It is

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff be allowed to hold his special class in a University building only if permission is sought and only if he assures the class that a blind grading system is used. It is

FURTHER ORDERED, ADJUDGED and DECREED that the University may not unreasonably withhold permission for the plaintiff to hold his special classes in a University building. It is

FURTHER ORDERED, ADJUDGED and DECREED that if the plaintiff decides to hold his special class at some place other than a University building he must assure the class that a blind grading system is used. It is

FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the plaintiff.

DONE and ORDERED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7230

Filed May 16, 1991
by Miguel J. Cortez
Clerk

PHILLIP A. BISHOP,

Plaintiff-Appellee,

versus

AARON M. ARONOV;
WINTON M. BLOUNT;
FRANK H. BROMBERG, JR.,
et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: COX and BIRCH, Circuit Judges, and GIBSON*, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on re-

* The Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE